
Don't be so Hostile!

**A Fresh Look at
Hostile Work
Environment Liability**



**2023 West Central MN SHRM
Employment Law Update**

Why Should We Care?

- No one wants to work in a negative work environment filled with tension and hostility.
- Depending on the **basis** of the hostility, it might be illegal.
- Unlawful HWE leads to lawsuits, damages, attorney's fees, etc.



What is the legal basis?

- Minnesota Human Rights Act (Minn. Stat. 363A.03, Subd. 43) defines sexual harassment to include “unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when: ...that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.”
 - Various state and federal courts have determined that an unlawful HWE can also exist based on other protected classes such as age, disability, religion, etc.
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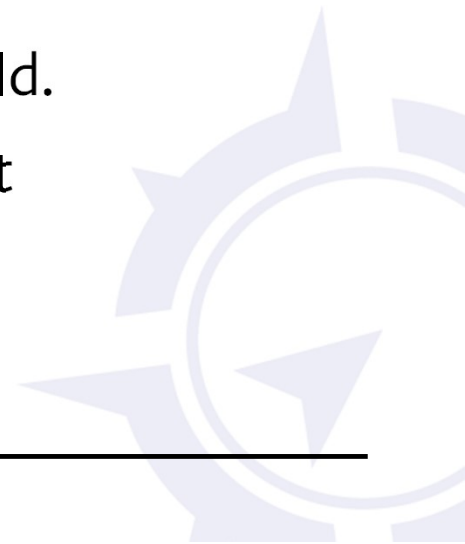
How hostile does it have to be?

- In Minnesota, “The discriminatory conduct creating the hostile work environment must be so **severe or pervasive** so as ‘to alter the conditions of employment and create an abusive working environment.’” *Henry v ISD #625*, 988 N.W.2d 868, 881 (Minn. 2023) (quoting *Kenneh v Homeward Bound*, 944 N.W.2d 222, 230 (Minn. 2020)).
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How severe or pervasive does it have to be?

Barbara's case:

- Barbara serves employer for 20 years. She is 57 years old.
 - For almost her entire tenure, Barbara receives excellent performance reviews.
 - Employer hires new department head.
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How severe or pervasive does it have to be?

Barbara's case:

- New department head, Davis, is hired & for first time in 19 years, Barbara gets a “below standards” rating, identifying shortcomings such as failing to meet deadlines, lack of visibility during work hours, failing to use the company vans for travel (as required by the company policy), and speaking to another supervisor in an agitated voice after being excluded from a training session.
 - Barbara is put on a PIP.
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How severe or pervasive does it have to be?

Barbara's case:

- Less than a month later, Barbara gets another performance review, again with below average ratings and Barbara is placed on another PIP.
 - Five months later, Barbara is reviewed again and given another below standards rating and placed on another PIP.
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How severe or pervasive does it have to be?

Barbara's case:

- Less than a month later, Davis writes to Barbara and says he is considering terminating her for failing to meet the terms of the PIP.
- Barbara resigns instead of waiting to be fired.

How severe or pervasive does it have to be?

Barbara's case:

- Was this severe or pervasive enough to create a HWE?



How severe or pervasive does it have to be?

Barbara's case – additional facts:

- Testimony that
 - Davis used PIPs to force employees out by either forcing them to resign or terminating them.
 - Davis specifically targeted Barbara for “performance” issues and instructed others to make it look like Barbara was not performing by writing the PIP in a way that Barbara could not achieve.
 - Davis exaggerated the negativity in Barbara's reviews.
 - It was the older employees who were forced out or whose lives were made miserable.
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How severe or pervasive does it have to be?

Barbara's case – additional facts:

- Testimony that
 - Davis's management style was "hostile."
 - Management, including Davis, had a pattern of trying to get rid of older workers and replacing them with younger ones.
 - Davis said, "long-term employees should consider retirement and travel like his parents."
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How severe or pervasive does it have to be?

Barbara's case with these additional facts:

- Was this severe or pervasive enough to create a HWE?



How severe or pervasive does it have to be?

Henry v ISD #625, 988 N.W.2d 868, 881 (Minn. 2023): “...the School District’s conduct in relation to [Barbara Henry] was **not** sufficiently severe or pervasive...”.



What severe or pervasive enough to be an HWE?

- The discriminatory conduct creating the hostile work environment must be so severe or pervasive so as “to alter the conditions of employment and create an abusive working environment.”
 - The conduct must be more than minor: “the work environment must be both objectively and subjectively offensive in that a reasonable person would find the environment hostile or abusive and the victim in fact perceived it to be so”
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What severe or pervasive enough to be an HWE?

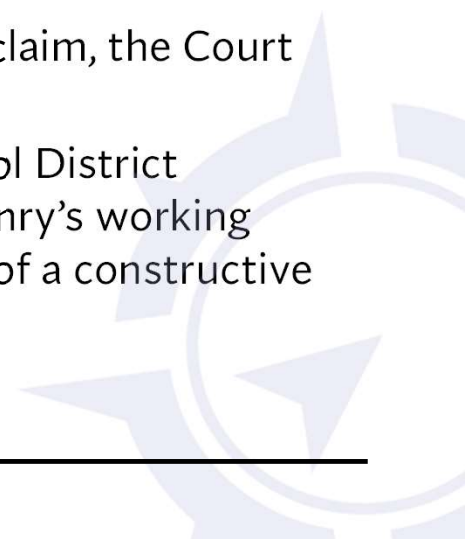
- It is based on the totality of the circumstances in each case, including:
 - The frequency of the discriminatory conduct;
 - Its severity;
 - Whether it is physically threatening or humiliating, or a mere offensive utterance; and
 - Whether it unreasonably interferes with an employee's work performance.

Why did Barbara Henry lose this argument?

- Even if Davis targeted Barbara based on her age, he never yelled at her, physically threatened her, etc.

“Absent some more objectively hostile or abusive behavior directed at Henry, what she is left with are the performance-related measures the School District took against her. Though, as we discuss below, these measures were seemingly designed to make her quit, they are a different form of discrimination than the type required to establish a hostile work environment. Notably, Henry did not allege any age-based verbal or physical harassment.”

But wait, that's just wrong!!

- Did School District #625 get by with targeted age discrimination?
 - Not necessarily. Although the Court threw out Barbara Henry's HWE claim, the Court allowed her constructive discharge claim to proceed.
 - Specifically, the Court said that the evidence "demonstrates that School District management took a number of deliberate steps calculated to make Henry's working environment unbearable so that she would resign." This was evidence of a constructive discharge under a disparate treatment age discrimination theory.
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Evolving Standards

- Assata's case.
 - Assata was employed by Acme Co. and worked with co-worker Anthony.
 - Assata claims that Anthony sexually harassed her for five months, including:
 - Complimenting her haircut.
 - Asking who cut her hair and where she lives.
 - Offering to cut her hair at her home or his.
 - Telling her he "likes it pretty all day and all night."
 - Telling her he likes "beautiful women and beautiful legs."
 - Talking to her in a seductive tone and licking his lips in a suggestive manner.



Evolving Standards

- Assata's case.
 - Assata claims that Anthony sexually harassed her for five months, including:
 - Blocking her office door with his body.
 - Saying, "I will eat you – I eat women."
 - Followed her to a gas station and asked her where she was going.



Evolving Standards

- Assata's case.
 - Assata complained to HR. HR investigated and said results were inconclusive but that Anthony would receive sexual harassment training.
 - Anthony's behavior escalated.
 - Crude / sexual expressions with his mouth and tongue
 - Called her sexy, pretty, and beautiful.
 - Continued to block her door with his body.
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Evolving Standards

- Assata's case.
 - Was this an unlawful HWE?
 - Trial court said NO!



Evolving Standards

➤ Assata's case.

Stressing “the high bar” that courts have set for sexual harassment claims based on a hostile work environment, the district court reluctantly determined that the conduct alleged did not meet the severe-or-pervasive standard for actionable sexual harassment. The district court found that “[s]ome of the conduct was boorish and obnoxious” and that the statement, “I will eat you. I eat women,” was “both objectively and subjectively unacceptable.” Nonetheless, the district court determined that the conduct, “however objectionable, does not constitute pervasive, hostile conduct that changes the terms of employment and exposes an employer to liability under the Minnesota Human Rights Act.”

Evolving Standards

➤ Assata's case.

- Minnesota Supreme Court disagreed. *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222 (2020).

For the severe-or-pervasive standard to remain useful in Minnesota, the standard must evolve to reflect changes in societal attitudes towards what is acceptable behavior in the workplace. As we recognized 30 years ago, the “essence” of the Human Rights Act is “societal change”; “[r]edress of individual injuries caused by discrimination is a means of achieving that goal.”

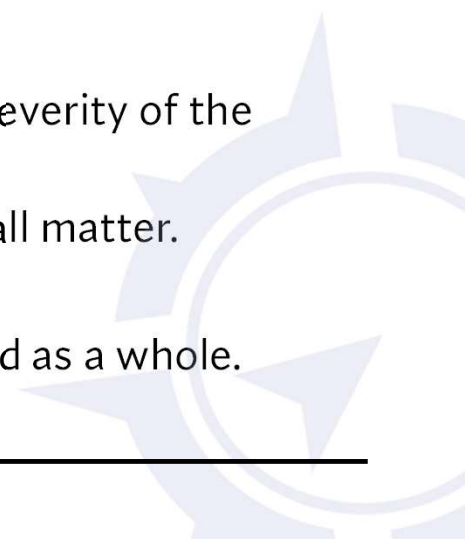
Evolving Standards

- Assata's case.
 - Minnesota Supreme Court disagreed.

Today, reasonable people would likely not tolerate the type of workplace behavior that courts previously brushed aside as an unsuccessful pursuit of a relationship, or boorish, chauvinistic, and decidedly immature. One of the avowed public policies of the Human Rights Act has been to foster the employment of all individuals in this state in accordance with their fullest capacities. In a hostile work environment, no employee can thrive.

Evolving Standards

- Assata's case.
 - Minnesota Supreme Court's evolved standard for HWE cases.
 - All circumstances must be considered, including the frequency and severity of the conduct, any physical threats, humiliation, interference with work.
 - Context, inflection, tone of voice, local custom, and historical usage all matter.
 - A single super bad act may be enough.
 - A series of lesser acts may be enough when combined and considered as a whole.
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Evolving Standards

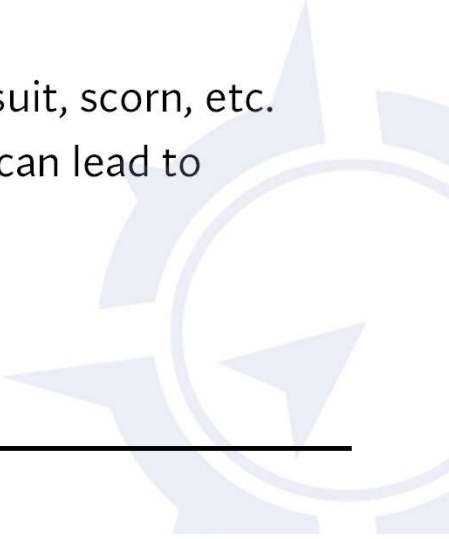
- Assata's case.
 - Minnesota Supreme Court's evolved standard for HWE cases.
 - Perhaps most importantly the Court said that these are generally questions of fact that need to be decided by a jury, and for Assata Kenneh:

Considering the totality of the circumstances, we conclude that Kenneh presented sufficient evidence for a reasonable jury to decide, on an objective basis, that Johnson's alleged behavior was sufficiently severe or pervasive to substantially interfere with her employment or to create an intimidating, hostile, or offensive employment environment.

Takeaways / Pointers

- The *Kenneh* decision made a bit easier for a plaintiff to prove HWE under the Minnesota Human Rights Act.
 - Stated another way, the *Kenneh* decision makes it more difficult for an employer to get HWE cases dismissed before trial.
 - **This makes it that much more important that you understand how the totality of the circumstances can add up to make a case for the employee who is a victim of workplace harassment.**
 - **This, in turn, makes it that much more important that you not allow an HWE to develop in the first place.**
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Takeaways / Pointers

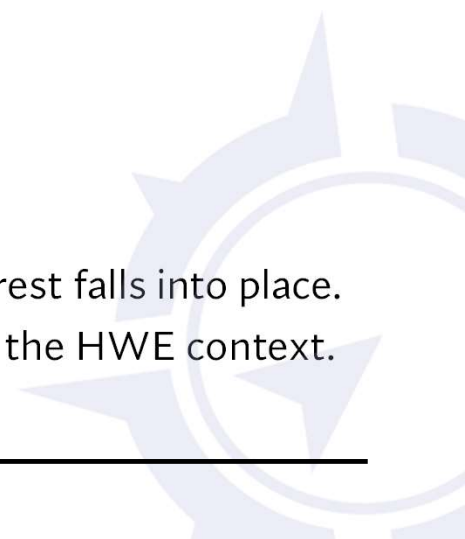
- Recognize how little things can escalate
 - One crude joke can lead to another.
 - Mild flirtation can lead to rejection, which can lead to more intense pursuit, scorn, etc.
 - A seemingly innocent hug or other touch can be misinterpreted and/or can lead to something much more inappropriate.
 - It might take time, but escalation over time is still escalation.
 - Context, tone of voice, etc. all matter.
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Takeaways / Pointers

- Recognize how the world (even the little bubble we call West Central Minnesota) is changing.
 - Change is hard!
 - Sometimes we resist it.
 - Sometimes resistance shows up in the form of rejection or other mistreatment of those who are different or who represent the change.
 - Resistance can lead to hostility.
 - Keep the focus **at** work **on** work. Does Billy's [fill in the blank protected class status] really matter at work? Isn't the point that all of us, including Billy, do what we are hired to do?
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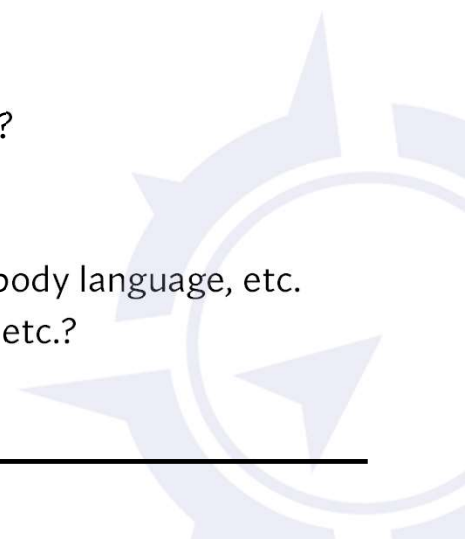
Takeaways / Pointers

- Make sure your policies are up to date.
 - Harassment and discrimination policies are a “must.”
 - Consider including a dating / office relationship policy.
 - Need an effective complaint reporting and resolution policy.
 - Consider expanding to Respectful Workplace and Anti-Bullying policies.
 - Treating each other with respect is at the core, so if you start there, the rest falls into place.
 - While “bullying” is not unlawful, it is not respectful, and it can be part of the HWE context.
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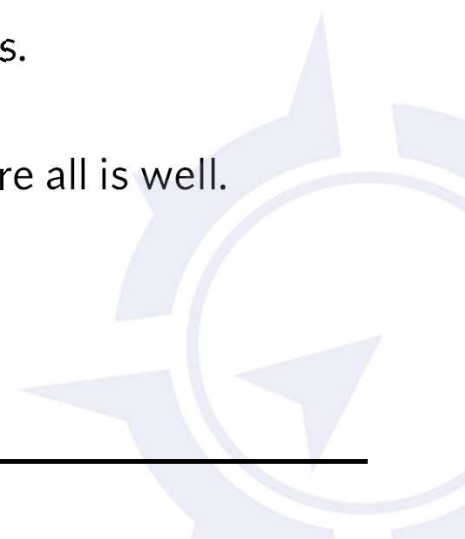
Takeaways / Pointers

- Take complaints seriously.
 - If an employee musters the courage to make a complaint, look into it.
 - Consider the entire context when reviewing the situation, such as
 - What is the allegation? What was said & who said it? Was there physical contact?
 - How long has it been going on?
 - How has it impacted work?
 - Don't forget to ask about subtle factors like the alleged harasser's tone of voice, body language, etc.
 - Were there witnesses? Is there documentation, texts, emails, social media posts, etc.?
 - If you are not equipped to look into it, hire someone to do it for you.
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Takeaways / Pointers

- Tailor your response to whatever you determine has happened.
 - If substantiated, take action that's appropriate under the circumstances.
 - Follow through and make sure the problems do not continue.
 - Check in with the complaining employee from time to time to make sure all is well.
 - Document the entire process from complaint to conclusion.
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Disclaimer

The information in this presentation is for general information purposes only and is not to be used as legal advice.

